Supreme Court, U.S.
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No. 00-289

In the Supreme Court of the United States

J.T. YARNELL, in his official capacity as Chief Engineer of the Missouri Department of Transportation, ET AL.,
Petitioners,

v.

MICHAEL CUFFLEY and the KNIGHTS OF THE KU KLUX KLAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8 of the Rules of this Court, petitioners submit this brief to address the brief filed by the United States on January 19, 2001, in response to the Court's invitation.

In its brief in this case, the United States concludes that the Court *should* grant review to address the question whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, required the State of Missouri to deny the Ku Klux Klan's application to participate in the State's Adopt-A-Highway program. The United States persuasively explains that the court of appeals misinterpreted Title VI, issuing an opinion that is inconsistent with the language of the statute, with regulations promulgated pursuant to Title VI that have been in place since 1970, and with this Court's decisions interpreting the statute. U.S. Br. 10-17. The United States also notes that the holding below often will make it impossible to prevent discrimination in programs receiving federal funds, substantially undermining federal and state authority to enforce Title VI. U.S. Br. 8-10, 17-18. And the United States demonstrates that the court of appeals' opinion will both disrupt the administration of federal funding programs and confuse the recipients of federal funds, an outcome that has serious implications for virtually every jurisdiction in the Nation. *Ibid.* For these reasons, we wholeheartedly agree with the United States' conclusion that review by this Court of the decision below is imperative.

Having said that, there is one point on which we take issue with the United States. Its brief suggests that the Court limit the grant of certiorari to the Title VI question. The only justification offered by the United States for limiting the grant of review is that judgment for the State on the Title VI point would make it unnecessary for the Court to resolve the other issues in the case. U.S. Br. 10, 19. We agree, of course, that a decision in the State's favor on Title VI should be dispositive. But that in no way renders it inappropriate for the Court to grant review on the other issues presented in the petition: the

questions whether Klan participation in the Adopt-A-Highway program would constitute state action, and whether the expressive activity involved in the program is that of the State rather than of the program participants.

If the Court were to grant review and rule *against* the State on the meaning of Title VI, Missouri's state-action and government-speech arguments would provide independent grounds on which to reverse the judgment below. Indeed, the United States recognizes that, "if the Klan were determined to be acting as an agent of the State [for Adopt-A-Highway] purposes, * * * the discrimination would violate the Equal Protection Clause." U.S. Br. 15 n.12. Moreover, as we argue in the petition (at 12-17, 24-27), the decision below on both the state-action and government-speech points cannot be reconciled with this Court's holdings, while contributing to pervasive confusion and inconsistent judgments in the courts of appeals. To be sure, resolution of these constitutional questions would be unnecessary if the Court ultimately were to rule for the State on statutory grounds. But that always will be the case when a petition presents both statutory and constitutional claims; that reality does not dictate denial of constitutional questions as a matter of course. Because the United States does not take issue in *any other* respect with the arguments for review of questions 1 and 3 that are presented in the petition, the Court should not limit its grant of certiorari.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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